PRIVY COUNCIL.

P. C.*
1888
November 21
December 19.

KALI DUTT JHA AND OTHERS (DEFENDANTS) *v.* ABDUL ALI AND ANOTHER (PLAINTIFFS).*

[On appeal from the High Court at Calcutta.]

Mahomedan Law—Guardian—Power of Guardians—Sale by guardian of property to which ward's title was in dispute, and for the benefit of the latter.

By the Mahomedan law, guardians are not at liberty to sell the immoveable property of their wards, the title to which property is not disputed, except under certain circumstances specified in Macnaghten's Principles of Mahomedan Law, Chapter VIII, cl. 14. But, where disputes existing as to the title to revenue-paying land, of which part formed the wards' shares, sold by their guardian, were thereby ended, and it was rendered practicable for the Collector to effect a settlement of a large part of the land, a fair price moreover having been obtained, the validity of the sale was maintained in favour of the purchaser as against the wards for whose benefit the transaction was.

Although the sale deed incorrectly stated the purpose of the sale to have been to liquidate debts, a statement repeated in a petition to the Collector, asking that settlement of the shares sold should be made with the purchaser, yet, on the transaction being afterwards impeached by the wards, *held*, that it was open to the guardian to prove the real nature of the sale, and to show that it was one beneficial to them.

APPEAL from a decree (8th February 1884) of the High Court, reversing a decree (17th January 1882) of the Subordinate Judge of Mozufferpore.

The two plaintiffs, now respondents, were the son and daughter of Bibi Udulunnissa, who died on the 26th October 1861, leaving them, with her husband, their father Sheikh Riazuddin Hossein, her heirs. The share of the latter in her estate was one-fourth, and the residue formed the children's shares. Riazuddin, who in his wife's lifetime had been managing her estate, continued to manage it as to the children's interests after her death, the son being little more than two years old, and the daughter about one year, and he being their natural guardian according to Mahomedan law.

* *Present:* LORD FITZGERALD, LORD HOBHOUSE, SIR R. COUCH, and MR. STEPHEN WOULFE FLANAGAN.

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The plaintiffs, of whom the first attained full age on 3rd May 1880, and the second was still a minor suing by her maternal grandmother, claimed to obtain possession of a one-anna share in a taluk named Wari in Zillah Durbhunga, and to have set aside, as to the one-anna share, a sale made by their father Riazuddin (the kobala or sale deed having been dated 7th May 1862), of two annas out of nine annas of the whole sixteen of taluk Wari, for Rs. 6,235 (the price of the one-anna share being half that amount). The sale was to Bhupat Jha, Sardari Jha, Madhuri Jha, and Ramdut Jha, described as share-holding proprietors and inhabitants of taluk Wari. They were defendants in this suit, their representatives and survivors being now appellants.

Taluk Wari, resumed as invalid lakhiraj in 1840, had from that time down to its final settlement by the Collector in 1862, been the subject of disputes, as to what persons were entitled to settlement; whether entitled as *maliks*, among whom were the predecessors of the Hindu respondents, the owners of neighbouring mouzahs, or entitled as *menhaidars* (persons holding at a reduced assessment), among whom were certain Mahomedans.

The taluk, including a share in it bought by Udulunnissa amounting to four-and-a-half annas (she having purchased jointly with her brother nine annas, and Riazuddin her husband holding benami for her), became the subject of various dealings. These are set forth in their Lordships' judgment, which also contains all the relevant facts relating to the deed of sale of 7th May 1862 executed by Riazuddin.

The plaint stated that the consideration of the sale deed, so far as regarded the one-anna share, was Rs. 3,117, which sum was alleged to have been appropriated by Riazuddin to his own use. The ground on which the sale was impeached was that Riazuddin had not obtained a certificate from the Civil Court to act as guardian, and that the sale was not made to pay off any debt, as alleged in the deed of sale, or for the plaintiffs' benefit.

Besides other grounds of defence, the following was relied upon, *viz.*, that the defendants or their predecessors in estate had acquired by purchase in 1856, from one Sufdar Hossein,

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the right to a certain share in taluk Wari; and by virtue of that right, and also of a right of pre-emption by reason of vicinage, as regarded other interests sold by Sufdar Hossein to the plaintiffs' great-grandfather Jaffer Ali in 1856 and 1857, had instituted five several suits, in which they, the defendants, claimed nine annas of the taluk, and were also claiming in a resumption suit, then, and since 1840, pending before the Collector of the District, the right to settlement with them of the interest which they had so purchased; that the sale to them by the plaintiffs' father was made for the purpose of putting an end to litigation, and that the consideration was applied to paying off a debt due from the plaintiffs', or their mother's estate, to a banking firm styled "Babu Gopal Das and Babu Bunsi Lal Das." And they further alleged that the suit was brought by the plaintiffs in collusion with their father, and contended that, even assuming that the plaintiffs' father had no right to sell their interest, his own interest in taluk Wari equalled or exceeded that which he had professed to sell, and that the plaintiffs had no title to what they claimed.

The issues raised the following questions, *viz.*: (1) whether the plaintiffs' father could sell the disputed property without having obtained a guardianship certificate from the District Judge; (2) whether the sale deed of 7th May 1862 was valid, either on account of benefit to the plaintiffs or because the father's share in his wife's property covered the interest sold; (3) whether the plaintiffs were benefited by the purchase money.

The Subordinate Judge dismissed the suit on the grounds that the plaintiffs' father, as their natural guardian, could without a certificate sell the plaintiffs' properties "under legal necessities;" that prior to the execution of the deed of sale in question, the five pre-emption suits alleged by the defendants were pending, and affected the interest of the plaintiffs' mother in taluk Wari, and the sale was effected *bonâ fide* to compromise those suits, and the consideration was paid to the bankers, to an account which stood in their books in the name of Wasimunnissa the plaintiffs' grandmother, but which was in fact the joint account of her and her daughter Udulun

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nissa the plaintiffs' mother, and the plaintiffs had the benefit of that payment; that the plaintiffs' father Riazuddin, who was by Mahomedan law entitled to one-fourth of his wife's interest in taluk Wari (*i.e.*, to one anna and two-and-a-half gundas), had not, as alleged by the plaintiffs, relinquished that share; that the present suit had been brought in collusion with him, and that he had evaded the process of the Court to obtain his appearance and evidence.

A Division Bench (MITTER and MACLEAN, JJ.,) reversed the judgment of the first Court, being of opinion that it was not proved that any money was, prior to the sale in suit, due from the plaintiffs' estate to the bankers, and that there was no account between the latter and the plaintiffs' estate; that no benefit had resulted to the plaintiffs from the compromise of the pre-emption suits, which appeared to have been brought against their mother and another, after her death, and which could hardly have been successful; and that therefore the plaintiffs had not benefited by the sale of their property by their father and guardian. And the Division Bench, differing therein also from the first Court, were of opinion that the evidence of the plaintiffs, and especially the language of the deed of sale in question, proved that Riazuddin had relinquished his interest in his deceased wife's estate, in consideration of her dower unpaid by him.

A decree in favour of the plaintiffs was accordingly made, and the defendants thereupon appealed to Her Majesty in Council.

Mr. *R. V. Doyne* appeared for the appellants.

The respondents did not appear.

For the appellants, it was contended by Mr. *Doyne* that the first Court had rightly held that the sale had been made by Riazuddin as guardian of the minors for their benefit. That benefit arose either from the liquidation of debts for which their mother's estate was liable, or from the pending litigation being brought to an end by the sale, and its being thereby rendered practicable for the Collector to effect a settlement of three-and-a-half annas of taluk Wari. The High Court's judgment was accordingly wrong, and that of the first Court should be restored.

Again, the evidence including that afforded by the language of the kobala of 1862, had been wrongly treated by the High Court as proof of Riazuddin's alleged renunciation of his share of his wife's estate, in satisfaction of her claim for unpaid dower. That renunciation had been by no means established. Moreover, in regard to the whole case, if the sale should appear on other grounds to have been made without title (though it was submitted that it was not so), it should nevertheless be considered that Riazuddin was at the time of the sale entitled to a share equal to, if not larger than, one anna of Wari, which share therefore passed to the defendants; so that this suit could not be decreed.

Their Lordships' judgment was, on a subsequent day, 19th December, delivered by

SIR R. COUCH.—The suit, which is the subject of this appeal, was brought by the respondents to have it declared that a deed of sale, dated the 7th May 1862, executed by the defendant Sheik Riazuddin Hossein, the father of the plaintiffs, was invalid, and for possession of a one-anna share in taluk Wari, which was the subject of that deed.

Mahomed Ali, who died in November 1854, had two wives, Wasimunnissa and Fakirunnissa. By the former he had a daughter, Udulunnissa, and by the latter a son, Mahomed Hossein. Udulunnissa married the defendant Riazuddin, and died on the 26th October 1861, leaving a son and daughter, the plaintiffs. Taluk Wari had been resumed as invalid lakheraj in 1840, and from that time to its final settlement by the Collector had been temporarily let to various persons. Disputes arose and doubts existed as to the persons who were entitled to settlement, and the final settlement was not made until the 19th May 1862. Between 1840 and 1862, there had been various dealings with the taluk. It will be sufficient to mention those which affected the parties to this suit. On the 19th December 1856, Syed Sufdar Hossein executed a deed of sale of one anna three pie eleven cowries plus a fraction (which may conveniently be called a two-annas share) in the taluk and its dependency Sosi Narhat, in favour of Bhupat Jha and Madhuri Jha in consideration of Rs. 2,250. On the 6th January 1857, Sufdar Hossein executed another deed by which (after stating the sale

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of the 19th December; and that owing to the inattention of the purchasers, the mutual exchange of equivalents did not take place, and the deed of sale remained with him; and that Udulunnissa and Fakirunnissa had, by their karpurdazes, claimed the right of pre-emption by reason of having, previously to the sale to Bhupat Jha and Madhuri Jha, purchased other shares in the taluk), Sufdar Hossein sold the two-annas share to Udulunnissa and Fakirunnissa for Rs. 2,250. On the 11th August 1856, the 4th December 1856, the 6th January 1857, the 29th January 1857, and the 23rd February 1857, purchases of other shares in the taluk and its dependency were made by Udulunnissa and Fakirunnissa. These shares, together with the share sold to them on the 6th January 1857, made up nine annas of the taluk, half of which was declared to belong to each of them. On the 31st December 1861, five suits were instituted against Fakirunnissa and Udulunnissa by Sardari Jha, the ancestor of some of the defendants, to establish a right of pre-emption to the shares composing the nine annas, and the Collector had before him these conflicting claims to the settlement.

It was in this state of things that the deed of the 7th May 1862 was executed by the duly empowered mokhtear on behalf of Riazuddin Hossein, described as the father and guardian of the plaintiffs, minor heirs of Udulunnissa, and on behalf of Fakirunnissa, mother and guardian of Mahomed Hossein, her minor son. By this a two-annas share of the nine annas of the taluk was sold for Rs. 6,235 to Bhupat Jha, Sardari Jha, Madhuri Jha, and Ramdut Jha, described as the shareholding proprietors and inhabitants of the taluk Wari. And it was stated that the Rs. 6,235 was for liquidating the debts due to Baboo Gopal Das and Bunsi Lal, mahajuns. One anna was said to be purchased by Bhupat Jha, and one by the other three. The books of the firm of Gopal Das and Bunsi Lal were produced. They contained accounts in the name of Mussummat Wasimunnissa, the grandmother of the plaintiffs, who appeared to be possessed of considerable property, but had no interest in the taluk Wari. From various entries in these accounts they appeared to relate to this taluk as well as to the property and transactions of Wasimunnissa. In the account for the year

1269 (1861-62), under the native date corresponding with 16th May 1862, is the following entry :—

	Rs.	As.	P.
The 3rd Jeyt Budi.—Received on account of the consideration money of two annas of taluk Wari debited to Bhupat Jha, Sardari Jha, Madhuri Jha, and Ramdut Jha	6,235	0	0
Deduct on account of the share of Fakirunnissa, which is debited to her	3,117	8	0
Remainder ... ... Rs.	3,117	8	0

On the other side of the account, under a date corresponding with the 13th January, among the entries of "paid on account of revenue into Collectorate," there is an entry "Wari, Rs. 181-9," and under a date corresponding with the 29th March an entry "Wari of Raja, Rs. 447-15," and on the date corresponding with the 26th May 1862 there is an entry, "Paid through Sheik Velait Hossein, in order to defray the expenses of the settlement of taluk Wari Rs. 2,500." It appears from the proceedings of the Collector of Tirhoot, dated the 19th May 1862, in a suit for obtaining permanent settlement of taluk Wari, that a petition was filed on behalf of Bhupat Jha and Madhuri Jha, stating that they were the purchasers of one anna three pies and eleven cowries and a fraction share, and subsequently on the 10th May 1862 a petition of withdrawal was filed on their behalf, stating that they withdrew from that claim filed previously, and praying that the deed of sale to them on the 19th December 1856 might be considered ineffective, and that the settlement might be effected with Fakirunnissa and others. And that subsequently on the 12th May 1862 another petition was filed on their behalf with the deed of the 7th May 1862, praying that a settlement of the two-annas share mentioned in that deed should be made with them. On the same 7th May 1862, consent decrees were made in the five pre-emption suits by which they were dismissed. Thus all opposition on the part of the Jhas as regards seven annas was withdrawn, and they claimed the settlement of only two annas under their new title. In the end, the settlement was made with Fakirunnissa, described as mother and guardian of Mahomed Hossein, and Riazuddin, described as father and guardian of the plaintiffs, for seven annas of the nine, and with the Jhas for the

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remaining two annas. The allegation in the plaint that Riazuddin appropriated the consideration for the sale of the 7th May 1862, was not only not proved, but was disproved, and nearly the whole, if not the whole, of the consideration appeared to have been applied on account of the taluk.

The Subordinate Judge held that the deed of the 7th May 1862 was valid, saying in his judgment that the pre-emption suits and the defendants' claim case before the Collector were "impending dangers over Wari at that time, and what might have been the consequence of those objections cannot be now determined at this distance of time, and I should therefore think that Riazuddin acted wisely in making a compromise with the defendants by executing the disputed kobala so soon as only eleven months after the death of Udulunnissa, and thereby to avert that danger." He dismissed the suit. The High Court set his decree aside, and made a decree for the plaintiffs, being, they said, "on the whole of opinion that the respondents (the defendants) failed to establish that any benefit was conferred upon the appellants by the sale by their father of the disputed property." The statement in the deed, and in the petition to the Collector on the 12th May 1862 of Riazuddin and Fakirunnissa, asking that a settlement of the two-annas share should be made with the Jhas, that the sale was for the purpose of liquidating debts due to the mahajuns, is not correct, though looking at Gopal Das's account, and the large payment made by his bank on account of Wari three weeks afterwards, the parties may have thought that it was correct; but at all events their Lordships think it does not preclude the defendants from proving the real nature of the transaction and that it was a beneficial one to the minors.

It is not a case of a sale by a guardian of immoveable property of his ward, the title to which was not disputed, in which case a guardian is not at liberty to sell except under certain circumstances.—Macnaghten's Principles of Mahomedan Law, chap. VIII, cl. 14. The right of Udulunnissa and Fakirunnissa to be purchasers of the nine annas was disputed. By the sale of the two annas, the dispute was put an end to, and thus a settlement obtained of the seven annas. Moreover the Rs. 6,235 appeared

to be a fair price for the two annas which had in December 1856 been sold by Sufdar Hossein for Rs. 2,250.

Their Lordships differ from the opinion of the High Court that the present appellants, who were then respondents, had failed to establish that any benefit was conferred upon the minors by the sale. They are of a contrary opinion, and looking at the whole transaction they think it was within the power of the guardian to make the sale.

There is another ground upon which the appellants are entitled to have the decree of the High Court reversed, and the decree of the Subordinate Judge dismissing the suit affirmed.

The case stated in the plaint is that Riazuddin had sold to the defendants one anna out of four-and-a-half annas, the property left by Udulunnissa in taluk Wari, and the plaintiffs only got three-and-a-half annas partitioned to them by the Collector. Now Riazuddin, as the husband of Udulunnissa, was entitled to one-fourth share of her property, and consequently the plaintiffs were in possession of more than they were entitled to by inheritance, their shares amounting to $3\frac{3}{8}$ annas. This objection was taken in the written statement of the Jha defendants. It was attempted to be met by some loose evidence of Riazuddin being liable for dower and relinquishing his share to the plaintiffs on that account. No document was produced, and the Subordinate Judge found, as a fact, that Riazuddin did not relinquish his one-fourth share. Their Lordships are of opinion, upon the evidence, that this finding was proper, and that the reason given by the High Court for not agreeing in it is insufficient. An admission of Riazuddin that he had relinquished his share, even if it was clearly made in the deed of sale, ought not to affect the other defendants. He had been ordered to attend as a witness, and did not do so, and the Subordinate Judge thought he was in collusion with the plaintiffs. This was highly probable, and the suit appears to their Lordships to be a dishonest attempt to get back property, for which the plaintiffs had received full consideration, and had had the benefit of it.

Their Lordships will, therefore, humbly advise Her Majesty to reverse the decree of the High Court, to dismiss the appeal to

the High Court, with costs, and to affirm the decree of the Subordinate Judge.

The respondents will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Barrow & Rogers.*

C. B.

P. C.* 1888 *December 6 and 19.*

* IN THE MATTER OF THE PETITION OF R. E. TWIDALE.

Privy Council, practice of—Admission to practise in the Privy Council—Rules of 31st March 1871—Vakil of High Court.

The words of ss. 2 and 3 of the Rules of 31st March 1871 are such that the classes of persons to be admitted to practise in the Privy Council must be either Solicitors or others practising in London, or Solicitors admitted by the High Courts in India or in the Colonies respectively, and have not left an undefined class admissible at the discretion of the Judicial Committee.

THIS was a petition by Mr. Richard Erasmus Twidale, a pleader in the High Court, Calcutta, to be admitted as Agent to practise in the Privy Council, upon his subscribing the declaration prescribed by the rules established by the order of Her Majesty in Council of 31st March 1871, "to be observed by Proctors, Solicitors, Agents and other persons admitted to practise before Her Majesty's Honourable Privy Council" (1).

After requiring in the first section that every Proctor, Solicitor, or Agent admitted to practise before the Privy Council or any of the Committees thereof, shall subscribe a declaration in the form given, the rules contain the following:—

2. Every Proctor, Solicitor, or Attorney practising in London, and duly admitted in any of the Courts of Westminster, shall be allowed to subscribe the foregoing declaration, and to practise in the Privy Council, upon the production of his certificate for the current year.

3. Persons not being certificated London Solicitors, but having been duly admitted to practise as Solicitors to the High Courts of Judicature in India or in the Colonies respectively, may apply by petition to the Lords of the Judicial Committee of the Privy Council; and such persons, if admitted to practise by an order of their Lordships, shall pay annually, on the 15th November, a fee of five guineas to the Fee Fund of the Council Office.

* *Present:* LORD FITZGERALD, LORD HOBHOUSE, and SIR R. COUCH.

(1) The rules are printed in the Appendix to "The Practice of the Judicial Committee," by William Macpherson, Esq., at p. 65.

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Mr. *R. V. Doyne*, in support of the petition, argued that the scope of the Rules of 1871 having been to state certain duties to be discharged by practitioners upon admission, their object had not been to define the classes of persons to be admitted to practise. This was left to be, as it must have been before the rules, a matter discretionary with their Lordships; and the second and third sections specified those classes in imposing a duty upon them, which hitherto alone had been admitted. But the rules were for an enabling purpose, imposed no limit upon the powers of the Committee, and used no negative words to confine the term "Agents" to any classes of persons. He referred to the case of *In the matter of the petition of W. Tayler.*

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—Since this case was argued their Lordships have considered the matter very carefully and they have been furnished with a copy of the shorthand notes of the proceedings on Mr. Tayler's petition; and they find, with some regret, that they are unable to accede to Mr. Twidale's request.

Mr. Twidale is a vakil of high standing and reputation in the Calcutta High Court; but he has not been admitted as a Solicitor anywhere, in England or in India. He now applies to be admitted to practise here as an Agent, and the question is whether the Orders in Council admit of such an application being granted. No doubt, there is some ambiguity about them because in general terms they refer to "Proctors, Solicitors, or Agents." There are four sections of the Order relating to the subject, and in the first and fourth of those sections all those terms are mentioned; but the two sections which show what is the mode of admission, and the classes to be admitted, are the second and third; and those only apply to Solicitors or others practising in London, and to Solicitors admitted by the High Courts in India or the Colonies respectively. The question is whether those rules 2 and 3 are exhaustive of the classes to be admitted, or, as was argued by Mr. Doyne, they only specified what should be done in the case of those two classes, and left an undefined class called "Agents," who were to be admitted at the discretion of the Committee. Mr. Tayler's case, which has been cited, is exactly in point. Mr. Tayler also was a vakil of the Calcutta High Court, and he had

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not been admitted as a Solicitor anywhere. He applied for leave to practise at this bar. His Counsel, Sir Roundell Palmer (Lord Selborne) put the case very much as Mr. Doyne has done. Lord Cairns, on behalf of the Committee, said in that case "the qualifications are in the Schedule." That means in the Orders I suppose; it is a mistake of the shorthand writer. "The third appears to be the only one upon which any claim can be made. The third applies to Solicitors practising in India." Then Sir Roundell Palmer said "yes, I see there are affirmative words which do not embrace this case: I do not perceive that there are any negative words which would exclude it." Well that is precisely the argument which Mr. Doyne put at the bar here. The answer to this is, "Lord Cairns:—There was an obvious reason for specifying the classes which are here specified. I do not say what may or may not be done hereafter, with regard to the very wide class of vakils who are under very different jurisdictions, but certainly they are not included at present in the Order." That (as will be seen) is exactly in point.

Their Lordships collect that the Committee on that occasion, as on this, were by no means disinclined to grant the petition, if it were within their power. But it has been expressly decided that it is not within their power, and their Lordships now must follow that decision, and refuse the application.

Petition rejected.

Solicitors for the petitioner: Messrs. *T. L. Wilson and Co.*

C. B.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Gordon.

1889
May 21.

MOHESH CHUNDER CHUTTOPADHYA (DEFENDANT) *v.* UMA-TARA DEBY (PLAINTIFF).*

Appeal—Bengal Tenancy Act (VIII of 1885), *s.* 153—*Cesses, Suit for—Bengal Act (IX of* 1880), *s.* 47—*Appeal in cases under Rs.* 100.

A suit to recover cesses for an amount not exceeding Rs. 100 falls under the provisions of s. 153 of Act VIII of 1885 with respect to appeals.

* Appeal from Appellate Decree No. 1545 of 1888, against the decree of H. Beveridge, Esq., Judge of 24-Pergunnahs, dated the 27th of June 1888, reversing the decree of Baboo Dino Nath Sircar, Munsiff of Baruipore, dated the 31st of December 1887.